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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
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10 McASEY, et al.,

11 Plaintiffs,

12 v.

13 UNITED STATES DEPARTMENT OF
14 THE NAVY,

15 Defendant.
16

) Case No. C 00-2063 JL

) Case No. C 00-2097 JL

) Consolidated Cases

) ORDER DENYING SUMMARY
JUDGMENT

17
18 **INTRODUCTION**

19 Defendant's Motion for Summary Judgment came on for hearing on August 1,
20 2001. Plaintiffs were represented by Craig Needham and Tamra J. English. Federal
21 Defendant was represented by Assistant United States Attorney Abraham Simmons.
22 This is an action seeking damages for the wrongful death of Robert McAsey. His widow,
23 Shari McAsey, and his two children, Robert W. McAsey and Tammy Marie McAsey-
24 Ingle, filed suit against the U.S. Navy, a contractor and two electrical companies,
25 following the death of Mr. McAsey on the job. He was excavating concrete with a metal
26 jackhammer which struck a live electrical line and he was electrocuted.

27 For good cause appearing the court hereby denies Defendant's Motion for
28 Summary Judgment on all counts.

FACTUAL BACKGROUND

On June 5, 1997, Dillingham Construction North America was awarded a \$9,754,474 contract by the United States Department of the Navy to make structural renovations at the U.S. Naval Weapons Station ("Station") in Concord, CA. By June of 1999, two years later, construction had not finished. In fact, the total contract price had grown to \$16,811,171, reflecting the 26 contract modifications the two had put into writing, as was expressly required by the contract. Simmons Decl., Ex. 3. The contract also contained a special provision for detecting underground electrical utilities, which constitutes an obvious potential danger to construction workers:

Location of the existing utilities is approximate. The Contractor shall physically verify the location and elevation of the existing utilities indicated prior to starting construction. The Contractor shall contact the Public Works Department at the Station for assistance in locating existing utilities. The Contractor shall scan the construction site with electromagnetic and sonic equipment and mark the surface of the ground where existing underground utilities are discovered.

In May of 1999, Dillingham began preparations for work on the Station's Substation 1A-54, which would include the excavation and removal of concrete surrounding two electric transformers. Dillingham project engineer Dale Swedberg requested an uninterrupted one-week shutdown of power to Substation 1A-54 as a precautionary measure, but it was denied by Sam Evans, a supervisory engineer for the Navy. Evans instead approved complete shutdowns for two successive Fridays with isolated partial shutdowns on other days. Sometime after this date but before June 8, Swedberg verbally asked Chris Coppinger, a utilities supervisor for the Navy, to conduct "a utilities search." Depo. Dale Swedberg 36:8-22 (Feb. 2, 2001).

On June 8, 1999, Dillingham and the Navy met to finalize preparations for the Substation 1A-54 project. At the meeting, Swedberg repeated his request to Coppinger that he perform "a utilities search" on the area, to which Coppinger agreed. Depo. Christopher Coppinger 44:23-45:8 (Mar. 12, 2001). Swedberg claims to have meant specifically an electromagnetic and sonic scan. Coppinger, on the other hand, claims to

have interpreted the request for “a utilities search” to mean a routine examination of the “as-built” maps and drawings in the Navy’s possession. Depo. Coppinger 44:23-45:8. Coppinger reviewed the “as-built” drawings and reported to Dillingham that he found no hazardous underground electrical utilities. The Navy did not conduct an electromagnetic and sonic search, and Dillingham did not seek absolute assurance that a full search of hidden subsurface electrical utilities had been conducted by the Navy before it began work on Substation 1A-54.

On Friday, June 12, 1999, power to the area surrounding Substation 1A-54 was completely shut down to protect Dillingham's laborers. Dillingham, however, did not complete its scheduled work to Substation 1A-54 on Friday, and Swedberg left a phone message to Coppinger indicating that the workers were unable to relock the gate and that they "were going to be coming back Monday." Depo. Swedberg 111:10. Swedberg did not specifically state that the workers would resume excavation with jackhammers on Monday but believed from previous conversations with Sam Evans that Substation 1A-54 would be partially de-energized and safe for work. Depo. Swedberg 112:12-13.

On Monday, June 14, 1999, Robert McAsey, Dillingham's laborer foreman, arrived at 7:00am and resumed excavation on Substation 1A-54 with a rivet-buster, or jackhammer. At approximately 8:00 a.m., McAsey struck a live, underground cable carrying at least 4,120 volts of electricity. The electric cable had not been discovered through examination of the "as-built" drawings, and an electromagnetic and sonic scan had never been performed by either party. Mr. McAsey was pronounced dead at 9:04 a.m. as a result of his injuries.

PROCEDURAL HISTORY

Two actions were initially filed against the Navy and others. The first was brought by Shari McAsey, the surviving spouse; the second by Robert W. McAsey and Tammy Marie McAsey-Ingle, the decedent's two children. Notice that the cases were related was filed, and the two actions consolidated. All defendants except the Navy have been

1 dismissed.

2 Plaintiffs' claims arise under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. §§
3 1346 (b)(1), 2671-80. With important exceptions, the U.S. may be held liable as a
4 tortfeasor for any "death caused by the negligent or wrongful act or omission of any
5 employee of the Government while acting within the scope of his office or employment .
6 . . ." 28 U.S.C. § 1346 (b)(1). An exception to liability exists where a claim is "based
7 upon the exercise or performance or the failure to exercise or perform a discretionary
8 function or duty on the part of a federal agency or employee" 28 U.S.C. § 2680 (a).
9 Plaintiffs have exhausted their administrative remedies. 28 U.S.C. § 2675. This court
10 holds exclusive jurisdiction over such claims. 28 U.S.C. § 1346 (b)(1). Resolution of
11 liability and damages is to be governed by California substantive law. 28 U.S.C. § 2674.

12 Plaintiffs filed two causes of action, the first based on the Navy's failure to
13 conduct an electromagnetic and sonic utilities search and the second relating to the
14 Navy's reliance on as-built drawings that failed to note an electrical line carrying in
15 excess of 4,000 volts.

16 Specifically, plaintiffs' first cause of action alleges a Dangerous Condition of
17 Public Property at the Station, controlled by the Navy. Plaintiffs allege that the Navy at
18 all times controlled the Station, had actual or constructive knowledge of its dangerous
19 condition, and foreseeably breached a nondelegable duty to ensure that the Station
20 was free from dangerous conditions.

21 Plaintiffs' second cause of action alleges a Dangerous Condition of Public
22 Property because of Design and Construction. Plaintiffs allege that the Navy had actual
23 or constructive knowledge of the dangerous conditions posed by the Station's design
24 and construction, held a nondelegable duty to ensure that the Station was free from
25 hidden hazards, and failed to remedy or notify decedent of the foreseeable risk posed
26 by these dangerous conditions.

27 The Navy moves for summary judgment on each claim. It has asked that, should
28 its motion be denied, the court resolve any factual disputes through an evidentiary

hearing, rather than a trial, in the interests of judicial economy.

ANALYSIS

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56 (b) permits a defending party to “move with or without supporting affidavits for a summary judgment in the party’s favor”

Summary judgment should be rendered if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” F.R.C.P. 56 (c). Whether a fact is material is determined by the substantive law of an individual case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is found where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* The moving party bears the burden of demonstrating the absence of a genuine issue of material fact and must identify those portions of the record that support its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where a moving party bears the burden of proof on a particular issue at trial, it must establish each element of its claim with enough certainty that a reasonable trier of fact could not find for the other party. *Id.* Should the party opposing the motion bear the burden of proof at trial, however, the moving party need only demonstrate the absence of evidence for the non-movant’s claim. *Id.* at 323-24. If the moving party meets its initial burden, the adverse party cannot rest upon its pleadings but must “set forth specific facts showing that there is a genuine issue for trial.” F.R.C.P. 56 (e).

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1 **II. A Reasonable Trier of Fact Could Infer an Oral Modification of the Navy's**
2 **Contract with Dillingham, Shifting Responsibility for Utilities Searches to**
3 **the Navy.**

4 California law permits the oral modification of a written contract, even one that
5 expressly forbids it, provided certain conditions are met. Cal. Civ. Code § 1698. "A
6 contract in writing may be modified by an oral agreement to the extent that the oral
7 agreement is executed by the parties." Id at § 1698 (b). This rule is not altered by a
8 contract's inclusion of a no-oral modification clause, as might be inferred from Cal. Civ.
9 Code § 1698 (c): "[u]nless the contract otherwise expressly provides, a contract in
10 writing may be modified by an oral agreement supported by new consideration."
11 (emphasis added). The Law Revision Commission's comments address the matter:
12 "such a provision would not apply to an oral modification valid under subdivision (b)."
13 The key is the extent to which a modification has been executed by both parties. See
14 *Conley v. Matthes*, 56 Cal. App. 4th 1453, 1466 (2d Dist. 1997) (barring application of
15 parol evidence rule to oral modifications already executed).

16 The Navy contends that the provision in the contract which expressly requires
17 Dillingham to "scan the construction site with electromagnetic and sonic equipment"
18 should control. Any modifications to the contract, the Navy contends, were subject to
19 formal procedures for approval and had to be conducted in writing, as reflected in the
20 26 other alterations to the contract executed in this way and a previous request for an
21 electromagnetic and sonic utilities scan made in writing.

22 Plaintiffs here have produced evidence that the contract provision regarding the
23 utilities searches was indeed both orally modified and executed. Dillingham's project
24 manager, Jack Leider, claims that he was told by Navy personnel at the outset of the
25 project that the Navy alone would perform such searches and that Dillingham should
26 verbally request them at weekly meetings. Depo. Jack Leider 25:7-26:11 (Feb. 22,
27 2001). Leider also states that the Navy actually did perform these searches exclusively
28 during the course of the project. Id. Moreover, a written instrument documenting the
Navy's comments on Dillingham's Health and Safety Plan plainly states that Dillingham

1 “must have base locate utilities and/or use detectors.” Pl.’s Ex. E at E-4.

2 Swedberg likewise states that the Navy wanted to handle all such searches and
3 asked for Dillingham’s compliance in this regard. Depo. Swedberg 115:7-24. Swedberg
4 stated that during the course of the project, he made multiple oral requests to
5 Coppinger for utilities searches and that Coppinger complied each time. Depo.
6 Swedberg 42:9-11. This testimony is reasonable, considering that the original process
7 for contract modification called for Dillingham to submit written requests for
8 electromagnetic and sonic scans to the Resident Officer in Charge of Construction. This
9 officer would then simply pass the request on to Coppinger himself for approval. Pl.’s
10 Ex. B, Coppinger, therein Ex. 21 at 2. Coppinger forthrightly admits that it has “always
11 been one of [the Navy’s] functions to locate the underground utilities.” Pl.’s Ex. B,
12 Coppinger, therein Ex. 21 at 4. The record, however, is not entirely clear as to how
13 many electromagnetic and sonic scans were performed after verbal requests as
14 compared to simple examinations of as-built drawings.

15 In the initial stages of the project, Leider attempted to obtain the services of an
16 independent utilities-searching company but was told by that company that it was not
17 allowed to conduct such services at the Station. Leider apparently did not contact any
18 other independent services but instead wrote a letter to the Navy, asking it “to conduct a
19 utility search around Pier 3 and alert us to any subsurface utilities within this area.” (Ex.
20 D, Leider, therein Exh. 17). The Navy conducted an electromagnetic and sonic scan in
21 response to this request at the beginning of the project.

22 In sum, the evidence indicates the existence of a genuine issue of material fact:
23 whether the two parties did orally, and through writing and conduct, modify the contract
24 and execute these modifications. If the contract was orally modified so that the Navy
25 assumed responsibility for conducting searches for underground electric utilities, this
26 would seem to create a duty to ensure that they be done effectively in a manner that
27 would avoid injury. Summary judgment would not be justified by the Navy’s assertion
28 that its contract with Dillingham included a clause barring oral modification.

1 Accordingly, the motion is hereby denied.

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3 **III. The Navy Assumed a Duty to Conduct Utilities Searches that Were**
4 **Sufficiently Extensive to Ensure Worker Safety.**

5 Plaintiffs also assert that, regardless of contractual modification, the Navy
6 voluntarily assumed the duty to furnish an electromagnetic and sonic scan of
7 Substation 1A-54 before construction began June 11, 1999. Prevailing California law on
8 the willful assumption of duty relies on Restatement Second of Torts § 324A:

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10 One who undertakes, gratuitously or for consideration, to render services
11 to another which he should recognize as necessary for the protection of a
12 third person or his things, is subject to liability to the third person for
13 physical harm resulting from his failure to exercise reasonable care to
[perform] his undertaking, if [] (a) his failure to exercise reasonable care
increases the risk of such harm, or [] (b) he has undertaken to perform a
duty owed by the other to the third person, or [] (c) the harm is suffered
because of reliance of the other or third person upon the undertaking.

14 See *Paz v. State of California*, 22 Cal. 4th 550, 558 (2000). The initial issue in a
15 negligence claim, whether a defendant owed a duty of care to a plaintiff, is a question of
16 law to be decided by the court. *Id* at 557.

17 In its defense, the Navy maintains that even if the contract were orally modified,
18 the Navy did not receive sufficiently clear notice from Dillingham that an
19 electromagnetic and sonic scan of the subsurface utilities around Substation 1A-54 was
20 necessary. The Navy asserts that Swedberg's repeated requests to Coppinger for "a
21 utilities search" were too vague to shift an affirmative obligation to perform an
22 electromagnetic and sonic scan to the Navy. The Navy argues that an examination of
23 the as-built drawings are all that could reasonably be inferred from such non-specific
24 requests. The evidence in the record, however, indicates otherwise.

25 In preparation for work on Substation 1A-54, Swedberg obtained the as-built
26 drawings of the surrounding area from the Navy in May 1999. Swedberg alone and then
27 again with Coppinger inspected the drawings at a joint meeting on June 8, 1999, where
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1 Swedberg renewed his earlier request for “a utilities search.” Coppinger claims that he
2 interpreted this to mean a simple review of the as-built drawings. But at the time of the
3 request, Swedberg had already examined the drawings himself and was in the process
4 of reviewing them again with Coppinger. It can be reasonably inferred that Swedberg
5 was not asking Coppinger to review the as-built drawings yet again, but rather to
6 conduct an electromagnetic and sonic scan of Substation 1A-54.

7 Swedberg notified Coppinger that he had spray-painted the area that needed to
8 be searched, an obvious precursor to a physical electromagnetic and sonic scan of the
9 area. Moreover, it should have been apparent to Coppinger that Dillingham itself had
10 not conducted an electromagnetic and sonic scan, because only one would be
11 necessary. The very fact that Dillingham requested a utilities search is evidence that it
12 had not performed a definitive electromagnetic and sonic scan but had only examined
13 the as-built drawings.

14 When Coppinger agreed to perform a utilities search, he should have understood
15 that an electromagnetic and sonic scan was the only type of search that had not yet
16 been completed and the only method that would ensure worker safety. Coppinger was
17 in charge of approving such utilities searches, and he had done so on a verbal request
18 in the past. When asked by Swedberg to conduct a utilities search, Coppinger told him
19 he “would take care of it.” Depo. Coppinger 45:1-8. All parties admit that the accuracy
20 of as-built drawings could not be guaranteed, yet Coppinger assertedly relied on those
21 drawings when performing a utilities search at Swedberg’s request.

22 To compound matters, Sam Evans represented to Swedberg that Substation 1A-
23 54 would be safe for construction work on the day of the accident. As noted, Evans had
24 earlier denied Swedberg’s request for a week-long power shutdown for the entire
25 Substation 1A-54, implying that the area would be safe to form and pour concrete under
26 a localized, partial de-energizing, or lockout. Depo. Sanford Evans 31:18-25 (Mar. 12,
27 2001). Swedberg claims that these representations by Evans allayed his concerns
28 about the safety of his crew, and that he proceeded with work on the following Monday

1 in reliance on them. (Depo. Swedberg 93:17-21).

2 From his deposition it is reasonable to infer that Evans thought that pouring and
3 forming concrete, rather than the excavation of it with a jackhammer, would be safe with
4 a partial shutdown of Substation 1A-54 on Monday. This conclusion, however, if Evans
5 actually did reach it, was never made clear to Swedberg. Presumably, each stage of
6 each sub-project in a two-year construction enterprise does not finish precisely when
7 planned. If Evans knew that excavation work could be dangerous with only the partial
8 shutdown of Substation 1A-54, and he was in charge of controlling power to the area,
9 he had a duty to make sure that the most effective procedures were employed.

10 Swedberg reasonably relied on Evans' assurances of safety. Unfortunately, Evans
11 made these assurances while relying solely on the same inaccurate as-built drawings
12 that Coppinger reviewed. And, as Evans admits, "[w]e don't have definite location
13 drawings . . . You can make assumptions and you can be wrong . . . We really don't
14 know the definite locations of stuff there." (Pl.'s Ex. C, Evans, therein Ex. 26 at 2).

15 Based upon the evidence in the record, a reasonable trier of fact could find that
16 the Navy willingly assumed the duty to conduct a utilities search of Substation 1A-54.
17 By the Navy's own admissions, an electromagnetic and sonic scan would have been
18 the only type of utilities search that would ensure worker safety with any degree of
19 certainty. As such, summary judgment would not be proper as to the Navy's claim that
20 Swedberg's request to Coppinger for "a utilities search" was too vague to be construed
21 as to require an electromagnetic and sonic scan. Accordingly, that motion is hereby
22 denied.

23 24 **IV. The Navy Has Not Demonstrated Exemption from Suit as a Special 25 Employer.**

26 The Navy also seeks to be classified as decedent's special employer, which
27 would leave California's workers' compensation laws as the exclusive remedy for
28 financial recovery. Cal. Lab. Code § 3600. A special employer "may enjoy the same

1 immunity from a common law negligence action on account of an industrial injury as
2 does the first or 'general' employer." *Santa Cruz Poultry, Inc. v. Superior Court*, 194
3 Cal. App. 3d 575, 578 (6th Dist. 1987). In determining whether a special- employment
4 relationship exists, "the primary consideration is whether the special employer has '[the]
5 right to control and direct the activities of the alleged employee or the manner and
6 method in which the work is performed" *Kowalski v. Shell Oil Co.*, 23 Cal. 3d 168,
7 175 (1979) (quoting *McFarland v. Voorheis-Trindle Co.*, 52 Cal. 2d 698, 704 (1959)).
8 Other considerations include whether a party has the power to terminate employment,
9 whether a party has provided the tools necessary for an employee's work, whether the
10 employee has expressly or impliedly consented to special employment, the relative skill
11 of the worker, and the length of such employment. *Id* at 179.

12 The Navy offers two brief arguments in support of its contention that it should be
13 classified as a special employer. First, the contract between the Navy and Dillingham
14 required the latter to maintain "workmen's compensation as required by Federal and
15 State workers' compensation and occupational disease laws." The Navy offers this as
16 proof of its intent at the outset of the contract to establish itself as a special employer.
17 However, "the actual nature of the employment situation, not the contract, controls."
18 *Santa Cruz Poultry, Inc.*, 194 Cal. App. 3d at 580. The determination of special
19 employment is not based on inclusion of such terms in a contract that it writes; rather, it
20 is determined by an examination of the factors listed above. Moreover, Dillingham was
21 independently required by law to secure workers' compensation insurance. The
22 contractual provision that Dillingham obey all existing laws cannot be construed as
23 evidence that the Navy intended to place specific demands upon Dillingham in order to
24 obtain special employer status.

25 Second, the Navy contends that it exercised control over Dillingham's workers,
26 as demonstrated by the weekly planning meetings it held with Dillingham and its control
27 over power shutdowns and scheduling work. This assertion of control is contradicted by
28 the statements of the two Navy personnel who regularly attended the weekly meetings.

1 Coppinger, the Station's utilities supervisor, testified that he had the authority to require
2 that Dillingham obtain necessary digging permits before starting work on Substation 1A-
3 54. Depo. Coppinger 75:17-25. However, Coppinger also acknowledged that he "cannot
4 direct the work of a contractor." Id at 75:25. Sam Evans, the Station's supervisory
5 engineer, attended quality control meetings and scheduled power shutdowns but claims
6 to have had very little involvement with Substation 1A-54 construction. Depo. Evans
7 19:23. In fact, he was not even present at the job site during Friday's complete power
8 shutdown or Monday's partial de-energizing of Substation 1A-54,)Pl.'s Ex. C, Evans,
9 therein Ex. 26 at 1).

10 "It is incumbent upon the employer to prove that the Workmen's Compensation
11 Act is a bar to the employee's ordinary remedy.' *Popejoy v. Hannon*, 37 Cal.2d 159,
12 173-174 (1951). The Navy has introduced no evidence that it had the authority to
13 terminate Mr. McAsey's employment, that it provided him with tools to perform his work,
14 or that Mr. McAsey either expressly or impliedly consented to a special-employment
15 relationship with the Navy. The Navy has not discharged its burden and demonstrated
16 its claim to this affirmative defense. Summary judgment for the Navy would not be
17 proper under its claim to a special-employment relationship with Mr. McAsey.
18 Accordingly, this motion is also denied.

19 20 CONCLUSION

21 The court denies summary judgment, as explained above, for the following
22 reasons:

- 23 1. Summary judgment based on the Navy's argument that its contract with
24 Dillingham included a clause barring oral modification is hereby denied. There is
25 sufficient evidence in the record for a reasonable trier of fact to find that the
contract was modified orally, by written instrument, and by conduct.
- 26 2. Summary judgment based on the Navy's claim that Swedberg's request to
27 Coppinger for "a utilities search" was too vague to be construed to require an
28 electromagnetic and sonic scan is hereby denied. A reasonable trier of fact could
find that Coppinger willingly assumed responsibility for conducting such a utilities
search. It is for this court to decide whether such a finding would create a duty to
perform an electromagnetic and sonic scan, the only search with any assured

1 accuracy. This court finds that it would create such a duty.

2 3. Summary judgment for the Navy based on its claim to a special-employment
3 relationship with Mr. McAsey is hereby denied. The Navy has not met its burden
4 on this issue. It produces only partial evidence, and that is contradicted by
5 admissions of Navy personnel.

6 4. The Navy's request for an evidentiary hearing, rather than a trial, would not
7 substantially promote the interests of judicial economy and is hereby denied.

8 This order resolves Document Number 28 of the court's docket.

9 IT IS SO ORDERED.

10 Date: August 20, 2001

11 _____
12 James Larson
13 United States Magistrate Judge
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